No. 12001

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation, *Appellant*,

v.

HENRY O. LINK, E. W. ELLIOTT and O. L. GRIMES, *Appellees*.

BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE ROGER T. FOLEY, *Judge*

SKEEL, MCKELVY, HENKE, EVENSON & UHLMANN
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INDEX

TABLE OF CASES

TABLE OF CASES *(Continued)*

STATUTES

TREATISES

JURISDICTIONAL STATEMENT

This is an appeal from the final decree entered in favor of the appellees in the above entitled action by the United States District Court for the Western District of Washington, Northern Division. The action was a libel in admiralty and in consequence the trial court had jurisdiction by virtue of Title 28 U. S. C. A. Sec. 41 (3) which confers upon the United States District Courts original jurisdiction of all civil causes of admiralty and maritime jurisdiction.

This court has jurisdiction of the present appeal by virtue of Title 28 U. S. C. A. Sec. 225 which provides as follows:

> "(a) The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error, final decisions—
>
> "First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

STATEMENT OF THE CASE

This appeal is from a final decree entered in favor of the appellees upon a libel filed by them in the United States District Court for the Western District of Washington, Northern Division.

The appellees, who were libelants below, filed a libel against the appellant in order to recover for a loss sustained by the *M.V. Eastern Prince* as a result of a collision with the *U.S.S. Roustabout* on the night of May 11, 1942. Prior to that date the appellant had issued to appellees a policy of marine insurance whereby appellant contracted to indemnify appellees for any war risk loss sustained by the vessel *Eastern Prince.* Appellant did not, however, contract to indemnify appellees for any marine risk loss sustained

by the *Eastern Prince*, such a policy of marine insurance having been issued to appellees by an underwriter other than appellant.

At a time when the *Eastern Prince* was proceeding northward on a commercial voyage from Seattle to Skagway, Alaska, she collided with the *Roustabout*, which was proceeding southward from Sitka, Alaska, for Seattle. This collision took place in the night at a point near Seymour Narrows in the Inside Passage to Alaska.

The *Roustabout* was a small commercial vessel, which had been requisitioned by the United States Navy for use as an auxiliary tanker. At the time of collision she was a commissioned vessel of the navy and, as such, was manned by commissioned officers and men of the navy. The armament of the *Roustabout* was light and for defensive purposes only, consisting of one three-inch, fifty-calibre gun, two fifty-calibre machine guns and two twenty-millimeter anti-aircraft weapons. Her naval classification was "Y. O." or "Yard Oiler," and she was assigned to the 13th Naval District. Prior to the collision in question the *Roustabout* was engaged in carrying bulk petroleum products from Seattle to Southeastern Alaska for the use of the Navy and Coast Guard in that area.

At the time of the collision the *Roustabout* was returning to Seattle in ballast. She had a small cargo hold for the stowage of dry cargo, but there was no direct testimony at the trial below as to the identity of any dry cargo which the *Roustabout* may have had in that hold at the time of the collision. Testimony was introduced, however, as to the character of the dry cargo commonly carried by the *Roustabout* when southbound from Alaska. The trial court found that on southbound trips the *Roustabout* carried such dry

cargo as empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles. The court further found that at the time of the collision, the *Roustabout* had aboard water ballast and miscellaneous dry cargo of the nature of that above mentioned.

The court found that the *Eastern Prince* was at fault in failing to exhibit red and green navigation lights, as required by law, these navigation lights having been obstructed by the deck cargo of the *Eastern Prince.* The court also found that the *Roustabout* was at fault in failing to keep to the right of the narrow channel, in failing to indicate a change of course on her whistle when within sight of the *Eastern Prince,* and in failing to keep a proper lookout.

The trial court found that at the time of the collision the *Roustabout* was engaged in warlike operations and that the collision and damage resulting therefrom to the *Eastern Prince* was a consequence of those warlike operations. The court further found that the collision occurred by reason of the mutual fault of both vessels and entered a final decree in favor of the appellees in the sum of $11,031.29 with interest thereon at 6 per cent per annum from the 11th day of September, 1942, together with the costs incurred by appellees.

SPECIFICATIONS OF ERROR

1. The court erred in its conclusion of law that the *U.S.S. Roustabout* was engaged in warlike operations at the time of its collision with libelants' vessel, the *M.V. Eastern Prince.*

2. The court erred in its conclusion of law that the collision and damage resulting therefrom to libelants' vessel, the *M.V. Eastern Prince,* was a consequence of warlike operations of the *U.S.S. Roustabout.*

3. The court erred in its conclusion of law that the collision between the *M.V. Eastern Prince* and the *U.S.S. Roustabout* was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the *M.V. Eastern Prince* and that libelants were entitled to judgment against respondent upon that policy of insurance.

4. The court erred in its conclusion of law that at the time of the collision the *U.S.S. Roustabout* was employed solely for naval tanker purposes.

5. The court erred in its finding that at the time of the collision the *U.S.S. Roustabout* had aboard dry cargo of the nature of empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles.

6. The court erred in finding that at the time of said collision the *U.S.S. Roustabout* and the *M.V. Eastern Prince* were both at fault.

7. The court erred in finding that the said collision occurred by reason of the mutual fault of both vessels.

8. The court erred in granting to libelants interest upon their judgment from the 11th day of September, 1942, rather than from the date of entry of the final decree in this cause.

9. The court erred in overruling respondent's exception to the sufficiency of the libel and in holding that the amended libel stated a cause of action.

I.

Appellant as War Risk Underwriter Became Liable to Appellees Only if Collision Between the Eastern Prince and the Roustabout Was a "Consequence of Hostilities or Warlike Operations."

The standard policy of marine insurance has tra-

ditionally enumerated the "adventures and perils" insured against in the following words:

> "Touching the adventures and perils which we, the assurers, are contented to bear, and do take upon us in this voyage, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandise, and ship, etc., or any part thereof."
>
> II Arnould, Marine Insurance and Average (10th ed.) 1039.

During the Napoleonic wars, however, underwriters frequently inserted a clause which provided that they should not be liable for the risk of capture, seizure or confiscation in port. In time this clause became lengthened to the following traditional language:

> "Warranted free of capture, seizure, arrest, restraint, or detainment, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."
>
> II Arnould, Marine Insurance and Average (10th ed.) 1157.

This clause is known as the "free of capture and seizure" or "F. C. & S." clause and, when inserted in a policy of marine insurance, relieves the underwriter of any and all losses caused by war risks.

In the policy of insurance issued by appellant to appellees upon the vessel *Eastern Prince*, the perils clause was as follows: (Ap. 14)

"Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, etc., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement."

The F. C. & S. clause of that policy was as follows: (Ap. 22)

"Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provisions of the Policy:

F. C. & S. Clause.

Nothwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise, also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

The policy issued by appellant, however, was expressly intended to cover only war and strike risks. These risks were assumed by appellant by means of a rider attached to the policy. Insofar as it is here relevant, that rider provided as follows: (Ap. 24)

> "It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty."

It is hence to be seen that by its contract of insurance appellant assumed to indemnify appellees for the very risks excluded by the ordinary F. C. & S. clause—and only for those risks. In other words appellant contracted to indemnify respondent "for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise, also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom."

It is clear that appellant became liable for damage to the *Eastern Prince* only if that damage was a "consequence of hostilities or warlike operations," for that damage was plainly not caused by capture, seizure, arrest or any other of the perils enumerated in the F. C. & S. clause. If the loss incurred by the *Eastern Prince* was not a "consequence of hostilities or warlike operations," it must fall upon the underwriter of the ordinary marine risks rather than upon the appellant as war risk underwriter.

II.

The Collision of the Eastern Prince and the Roustabout

Was Prima Facie a Marine Risk and the Burden Was Upon the Appellees to Prove That It Was a War Risk.

It is universally conceded that the collision of two vessels is prima facie a "peril of the sea" as that phrase is traditionally employed in the standard policy of marine insurance. It has indeed been said: "There are certain general classes of accidents which are always held to be perils of the sea. They are the three following: (1) Collision, (2) Foundering, (3) Stranding, shipwreck or grounding."

> Abbot, Perils of the Sea, 7 Harv. L. Rev., 221 at 224;
>
> See also: II Arnould, Marine Insurance and Average (12th ed.) 1098.

Since a collision is presumptively a peril of the sea, the burden of rebutting that presumption must be assumed by the party denying that a particular collision was a marine risk.

> *Britain Steamship Company, Ltd., v. The King* (1921) 1 A. C. 99.

In the present case the burden is not upon the appellant to establish that the *Eastern Prince-Roustabout* collision was a marine risk, but rather is the burden upon appellees to establish that the collision was not an ordinary marine risk.

III.

Appellant as War Risk Underwriter Became Liable for Damage to the Eastern Prince Only If (a) the Roustabout Was Engaged in a Warlike Operation and (b) The Collision Was Proximately Caused By That Warlike Operation and (c) the Roustabout Was Wholly or Partially at Fault.

It would seem that it could be determined with ease whether any particular marine loss was one to be as-

sumed by the marine risk or the war risk underwriter. Quite the opposite, however, is found to be true. Even the most cursory examination of the reported cases reveals that during and after three different wars, the American Civil War, World War I, and World War II, the courts of both England and America have been repeatedly confronted with the problem of characterizing a loss as being a marine risk or a war risk loss. As will appear in this brief, it is an area of the law replete with contrary and irreconcilable decisions. One judge has remarked as follows concerning it:

> "I find it most difficult to extract any guiding principle from the judgments. Dictum conflicts with dictum and decision opposes decision."
>
> *Harrisons, Limited, v. Shipping Controller*, (1921) 1 K. B. 122.

In their treatment of the present problem the English courts have refused to declare that one of two cases, in irreconcilable conflict, is wrong. Their procedure has been to seize upon factual differences, which have been in fact not differences at all, in order to justify a decision patently contrary to one or more prior decisions. This has inescapably resulted in a welter of decisions requiring critical re-examination.

Were we dealing with the decisions of the American courts alone, the need for such re-examination would be absent, for, as will appear, the American courts have, with the exception of the trial court in the case at bar, spoken with uniformity of principle. Whenever they have been confronted with the issue of war or marine risk, the courts of this country have approached that problem in the same manner and have, in consequence, arrived at decisions perfectly consistent one with the other.

The many decisions concerning war and marine

risks have enunciated principles almost as numerous as the factual situations upon which those decisions were predicated. Too often those decisions have been entirely ad hoc, yet from them may be deduced certain general principles applicable to all war risk cases.

The problem of whether a risk is a war or a marine risk almost invariably arises in one of two ways. In suits against marine underwriters the latter have urged that the loss was a war risk and hence excluded by the F. C. & S. clause of the policies issued by the marine underwriters. In suits against war risk underwriters, the latter have urged that the loss was a marine risk and hence not within the coverage of policies of insurance issued by those underwriters.

In many cases of marine damage there is not the slightest controversy as to the characterization of the loss. For example, losses resulting from torpedoing, from floating mines, from aerial bombing and from shore bombardment are obviously war risk losses. On the other hand, a loss resulting from a fire unconnected with a warlike operation, or from stranding while engaged in a purely mercantile voyage, is just as obviously a marine risk loss.

A controversy between marine and war risk underwriters has almost invariably arisen, however, whenever a typically marine casualty, *i.e.*, damage by wind or wave, by a collision, or by a stranding, has occurred at a time when the vessel in question was more or less connected with a war operation.

Typical of such war risk-marine risk controversies is the case at bar, for here a collision, a prima facie marine risk, occurred between the *Eastern Prince* and the *Roustabout* at a time when one of the vessels, the *Roustabout*, was, it is contended by appellees, engaged in a warlike operation.

The reported cases have laid down certain rules for characterizing any particular casualty as a war risk or as a marine risk loss. The first of these is that the war risk underwriter does not become liable for a loss suffered by a vessel from a typical marine casualty (collision, stranding, or damage by wind and wave) if that vessel, nor the other vessel in case of collision, was engaged in a warlike operation. The facts of a few of the decided cases will make this clear.

In *Wynnstay Steamship Company, Ltd., and W. I. Radcliffe Steamship Co., Ltd. v. Board of Trade*, (1925) 23 Ll. L. Rep. 278, the *Radcliffe* collided with the *Sylvan Arrow* in an anchorage. The *Radcliffe* was a merchantman; the *Sylvan Arrow* was a U. S. Navy tanker. It was there held that at the time of the collision, neither vessel was engaged in a warlike operation and hence that the loss could not be a war risk loss.

So also in *Clan Line Steamers, Ltd., v. Liverpool and London War Risks Insurance Association, Ltd.*, (1943) 1 K. B. 209, the *Clan Stuart* collided with the *Orlock Head* while the former was proceeding with cargo from England to South Africa and the latter was carrying a cargo from England to France. It was held that neither vessel was engaged in a warlike operation and hence that the loss could not be a war risk loss.

It is hence to be seen upon the authority of the foregoing cases alone, and more could be cited, that a loss by a traditional peril of the sea cannot be a war risk loss unless one or more of the vessels involved was at the time of the injury engaged in a warlike operation.

The second general principle to be deduced from the decided cases is that even though an ordinary marine loss occurs while one or more of the vessels involved is engaged in a warlike operation, the marine risk underwriters are liable unless the loss was proximately

caused by the particular warlike operation in question.

In *Leyland Shipping Company, Ltd., v. Norwich Union Fire Insurance Society, Ltd.*, (1918) A. C. 350, the *Ikaria* was torpedoed but was able to make the Port of Havre and there moored alongside a quay. Subsequently, a gale sprang up, and the *Ikaria* was moved to a mooring in a more exposed position where she was sunk by the wind and waves. It was there held that the proximate cause of the sinking was the torpedoing and that the loss was hence a war risk loss despite the fact that the *Ikaria* was, as a matter of fact, engulfed by heavy seas. Lord Dunedin said in that case at (1918) A. C. 350 at 362:

> ". . . You must seek for the causa proxima, if it is well understood that the question which is proxima is not solved by the mere point of order in time."

In *Ionides v. The Universal Marine Insurance Assn.*, 14 C. B. N. S. 258, 143 E. R. 445 (1863), the *Linwood* was on a voyage from Rio de Janeiro to New York with a cargo of coffee. At the time the American Civil War was in progress and Confederate soldiers had extinguished the light at Cape Hatteras in order to harass Federal shipping. The *Linwood* went aground near Cape Hatteras and was lost. The court held that the loss was a marine risk loss, Willis, J., saying at 143 E. R. 445 at 457:

> "It (the extinguishment of the light) may or may not have been the cause of the vessel being destroyed; but it was not the proximate and absolute certain cause of the loss. The proximate and absolute cause of the loss was the vessel being out of her course and getting on the rocks at Hatteras Inlet."

In *Britain Steamship Company, Ltd., v. The King* (1921) 1 A. C. 99, the *Petersham* collided with an-

other vessel at a time when the *Petersham* was sailing in convoy without lights on a voyage from Bilbao to Glasgow with a cargo of iron ore. In discussing causation, Viscount Cave said at (1921) 1 A. C. 99 at 107:

> "In order to establish that (the collision was a 'consequence of hostilities or warlike operations') it is necessary to show, first, that there were hostilities or warlike operations which could have caused the collision, and secondly, that the collision was a direct and proximate consequence of those hostilities or warlike operations."

So also in *Yorkshire Dale Steamship Co., Ltd., v. Minister of War Transport* (1942) A. C. 691, 58 T. L. R. 263 the Lord Chancellor said at 58 T. L. R. 263 at 264:

> "Authority is hardly needed for the proposition that you do not prove that an 'accident is the consequence of a warlike operation' merely by showing that it happened 'during' a warlike operation. For example, if a commercial vessel while proceeding from one war base to another with munitions on board is destroyed while at sea by accidental fire the cause of which is quite unconnected with the nature or method of her journey or the nature of the cargo she carried, I should suppose that it could not be said that her destruction was proximately caused by her warlike operation."

In II Arnould, Marine Insurance and Average (12th ed.) 1090 it is stated:

> "In order to sustain the allegation that the loss was by perils of the seas or by any other perils insured against, it must be shown that such perils were the proximate cause of the loss."

In Poole, Marine Insurance of Goods (1st ed.) it is stated at page 192:

> "With special reference to the perils insured against the rule of *causa proxima non remota spectatur* has to be applied in determining the

> cause of the loss; that is, in the event of a complication of causes, the proximate cause and not the remote cause, must be regarded in order to decide for the purposes of insurance the peril to which the loss is to be attributed. Or, as has been previously seen, the indemnity of the policy is stated expressly to be available only in the event of the loss being due to specific perils—and the loss in question may be due to one that is not specified, as determined by the *causa proxima* rule."

In England the common law rule that an underwriter is liable for only those losses proximately caused by the perils insured against became a part of the statutory law of that country by virtue of the Marine Insurance Act, 1906, 6 Edw. 7, c. 41. Sec. 55 of that Act provides as follows:

> "Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

Our Supreme Court has made it incontrovertibly clear that this rule of proximate cause prevails in the United States and that an underwriter is liable for only those losses proximately caused by the peril insured against.

> *Morgan v. United States,* 81 U. S. 531, 20 L. ed. 738 (1872);
>
> *Queen Insurance Company v. Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487, 68 L. ed. 402 (1923).

In Lanasa Fruit Steamship & Importing Co., Inc., v. Universal Insurance Co., 302 U. S. 556, 82 L. ed 422 (1938) the *Smaragd* stranded and her entire cargo of bananas became overripe before the vessel could be refloated. The court said in 82 L. ed. 422 at page 426:

> "The sole question is whether in these circumstances the stranding could be regarded as the proximate cause of the loss."

And thereafter said on the same page:

> "It is true that the doctrine of proximate cause is applied strictly in cases of marine insurance."

The third general principle which may be deduced from the decided cases is that the war risk underwriter does not become liable for a loss caused by collision unless that collision occurred because the vessel engaged in the warlike operation was either wholly or partially at fault. This may best be illustrated by *Clan Line Steamers, Ltd., v. Board of Trade* (1929) A. C. 514. In that case the vessel *Clan Matheson* collided with the vessel *Western Front.* At the time of the collision the *Clan Matheson* was admittedly not engaged in a warlike operation whereas the *Western Front* was so engaged. Both ships were proceeding in the same convoy, when, through no fault of those aboard the *Clan Matheson,* the steering gear of that vessel broke down, and she veered out of column and was struck by the *Western Front.* It was found that the *Western Front* was without fault in the matter. In that case it was held that since the collision occurred through no fault of the vessel which was engaged in a warlike operation, the loss was a marine risk rather than a war risk loss.

a. The Roustabout Was Not Engaged in a Warlike Operation at the Time of the Collision and the Loss Was Hence Not a War Risk Loss.

Specification of Error: 1. The court erred in its conclusion of law that the *U.S.S. Roustabout* was engaged in warlike operations at the time of its collision with libelants' vessel, the *M.V. Eastern Prince.*

Specification of Error: 3. The court erred in its conclusion of law that the collision between the *M.V.*

Eastern Prince and the *U.S.S. Roustabout* was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the *M.V. Eastern Prince* and that libelants were entitled to judgment against respondent upon that policy of insurance.

Specification of Error: 5. The court erred in its finding that at the time of the collision the *U.S.S. Roustabout* had aboard dry cargo of the nature of empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles.

The *Eastern Prince* was admittedly not engaged in a warlike operation. The resultant loss was therefore clearly a marine risk loss unless the *Roustabout* was engaged in a warlike operation. We submit, however, that she was not so engaged.

The *Roustabout* was a small oil tanker designed for the carriage of bulk petroleum products (Ap. 97). At one time she had been privately owned and operated but prior to the time of the collision in question she had been converted into a navy ship and had been placed in commission (Ap. 182). Her navy classification was "Y. O." or "Yard Oiler," and, as such, her activities were confined to one naval district (Ap. 207) as opposed to an "A. O." or "Fleet Oiler." Her speed was slow, being but eight knots (Ap. 193) and her armament lighter than that of an ordinary merchant vessel (Ap. 195). This armament consisted of one three-inch, fifty-calibre stern gun, two fifty-calibre machine guns on the bridge, and two twenty-millimeter guns forward (Ap. 98). As a navy vessel the *Roustabout* was manned by navy personnel (Ap. 81). She, however, was not a combat vessel but was merely an auxiliary vessel under the supervision of the officer in charge of auxiliaries in the 13th Naval District (Ap. 79).

The *Roustabout* regularly ran from Seattle to Southeastern Alaska (Ap. 85), her principal port of call in Alaska being Sitka (Ap. 90). At the time of her collision with the *Eastern Prince* the *Roustabout* was returning to Seattle from Sitka (Ap. 110). Sitka is located in what is known as Southeastern Alaska, which is that narrow strip of coast land extending southward from the main body of Alaska. The Japanese attack nearest to Sitka was one air raid upon Dutch Harbor (Ap. 199), a point one thousand one hundred miles from Sitka. The nearest land occupied by the Japanese was approximately two thousand miles from Sitka (Ap. 199).

On her northbound trips the *Roustabout* carried bulk petroleum products, together with a small quantity of dry stores. The captain of the *Roustabout* testified that the dry stores on the northbound trips were mostly ship's service stores (Ap. 99) and that these ship's service stores consisted of such merchandise as soft drinks, fountain pens and the like (Ap. 99). One of the crew of the *Roustabout* testified (Ap. 208) that the northbound cargo consisted of such general cargo as automobiles, food products, ship's service materials, clothing and the like.

On her southbound trips, and it must be remembered that the collision in question occurred while the *Roustabout* was on such a southbound trip, the *Roustabout* traveled in ballast, *i.e.*, she would carry sufficient water to make her handle properly (Ap. 89). At the time of the collision the *Roustabout* was, as a matter of fact, proceeding in ballast (Ap. 110).

There was no testimony to the effect that there was any specific dry cargo aboard the *Roustabout* at the time of the collision. The captain of the *Roustabout* testified (Ap. 186) that upon the southbound trips the *Roustabout* had at one time or another carried such

cargo as empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks, automobiles, and defective torpedo cases. A member of the crew of the *Roustabout* testified (Ap. 208) that the *Roustabout* carried southward material that needed repair or any material the navy deemed as salvageable, such as air bottles and oxygen tanks for the Coast Guard activities, damaged observation planes, and, from time to time, defective ammunition (Ap. 215). The Coast Guard officer in charge of that sector testified (Ap. 186) that he could remember the *Roustabout's* carrying empty drums, broken cases of old ordnance material, Coast Guard tanks, and occasionally personnel.

Whenever the *Roustabout* reached Sitka, it came under the jurisdiction of the Coast Guard officer in charge of floating units in that sector (Ap. 181) and the petroleum products carried by the *Roustabout* were used in that sector (Ap. 189).

The *Roustabout* went from Seattle to Sitka and returned through what is called the Inside Passage to Alaska. This passage consists of protected waters lying between the coast of Canada and Alaska and the large islands lying off that coast.

At the time of the collision there were no restrictions of any kind as regards navigation lights upon vessels using the Inside Passage. All vessels exhibited, and were required to exhibit, the same navigation lights as are exhibited by vessels in peace time (Ap. 107). All of the shore aids to navigation were in operation as in peace time (Ap. 107), and vessels were not required to zigzag or to be blacked out while underway (Ap. 108).

The mere recital of the facts concerning the character of the *Roustabout*, its cargo, its function, and the locale of its voyages is in itself sufficient to indicate

that the *Roustabout* was not engaged in a "warlike operation," as that phrase is commonly understood.

The decided cases are in accord with the common sense view that such an operation is not "warlike" within the contemplation of those words in a policy of war risk insurance.

In many of the decided cases one of the vessels involved was clearly engaged in a warlike operation and it was by the court so held. The following are cases illustrative of such facts:

In *Ard Coasters, Ltd., v. The King* (1920) 36 T. L. R. 555, the *Ardgantoch* collided with the *H.M.S. Tartar*, a British destroyer, at a time when the latter was engaged in partoling for submarines. It was there held that the *H.M.S. Tartar* was engaged in a warlike operation.

In *Liverpool and London War Risks Ins. Assn., Ltd., v. Marine Underwriters of S.S. Richard de Larrinaga* (1921) 2 A. C. 141, the *Richard de Larrinaga* collided with the *H.M.S. Devonshire*, a British cruiser, at a time when the latter was proceeding at best speed and without navigation lights from Halifax to Hampton Roads in order to pick up and escort a convoy across the Atlantic. It was there held that the *Devonshire* was at the time engaged in a warlike operation.

In *Charente Steamship Co., Ltd., v. Director of Transports*, 38 T. L. R. 148, the *Instructor* collided with the *America*, an ex-German liner, operated as a United States naval vessel and at the time carrying American troops to France. It was there held that the *America* was engaged in a warlike operation.

In *Hain S. S. Co. v. Board of Trade* (1929) A. C. 534, the *Trevanion* collided with the *U.S.S. Roanoke*, an American mine-planter, at a time when the latter was proceeding from England to the United States

with seven hundred and twenty live mines aboard. This collision occurred in December, 1918, after the signing of the Armistice. As the war had not as yet been concluded by a formal peace treaty, it was there held that the *U.S.S. Roanoke* was engaged in a warlike operation.

One need but recall the facts concerning the size, the speed, the armament, the cargo, the conditions of navigation and the function of the *Roustabout* to realize that she cannot in any respect be likened to a British destroyer on anti-submarine patrol, to a British cruiser on its way to pick up and escort a convoy across the Atlantic, to a United States navy transport carrying troops to the battle area in France, nor to a United States naval mine-planter carrying literally tons of tremendously destructive instrumentalities of war.

The only point of similarity between the *Roustabout* and each of the vessels above mentioned is that the *Roustabout* was a commissioned naval vessel. Its official designation was admittedly the *U.S.S. Roustabout* or the *U.S.S.Y.O.* number such and such. Yet, by the mere addition of the three letters "U.S.S.," the *Roustabout* was not transformed from a peaceful tanker into a formidable man-of-war. It was a tanker before its commissioning as a naval vessel; it remained so after that commissioning. It was not a combat vessel before that commissioning; it was not a combat vessel after that commissioning. It was not a warlike vessel before that commissioning; it was not a warlike vessel after that commissioning.

As was testified (Ap. 80), the Navy itself distinguishes combat ships from auxiliaries. The *Roustabout* obviously fell within the latter classification.

In Colombos, A Treatise on the Law of Prize, (Grotius Soc. Pub. No. 5) page 252, the author says:

> "It is believed that the best definition of a warship is that found in the Proclamation of the President of the United States of May 23, 1917."

That proclamation was Presidential Proclamation 1371, 35 Code Fed. Regs. § 4.161-4.176, concerning the regulation management and protection of the Panama Canal. It provided as follows:

> "4.162: A vessel of war, for the purposes of Sections 4.161-4.176, is defined as a public armed vessel, under the command of an officer duly commissioned by the government, whose name appears on the list of officers of the military fleet, and the crew of which are under regular naval discipline, which vessel is qualified by its armament and the character of its personnel to take offensive action against the public or private ships of the enemy.
>
> "4.163: An auxiliary vessel, for the purposes of Sections 4.161-4.176, is defined as any vessel, belligerent or neutral, armed or unarmed, which does not fall under the definition of Section 4.162, which is employed as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding in hostilities, whether by land or seas; but a vessel fitted up and used exclusively as a hospital ship is excepted."

It is thus seen that both the United States Navy and the President of the United States have recognized that there is a fundamental distinction between a combat ship or vessel of war and an auxiliary, even though the latter is indeed a commissioned naval vessel. Under the classification of the Navy the *Roustabout* was clearly not a combat ship. Under the classification of the President of the United States, the *Roustabout* was clearly not a vessel of war as it was obviously not qualified to take *offensive* action against the public or private ships of the Japanese Empire.

When neither of the colliding vessels has been a

warship, even though one has been a naval vessel, the loss has been a war risk loss only if one or more of the colliding ships was at the time actually engaged in a warlike operation. For example, in the *Instructor* case, *supra*, the *Instructor* collided with the *America*, an ex-German liner which had been taken into the United States Navy, and was being used for conveying American troops to France. It was there held that the *America* was engaged in a warlike operation, not because of her being a U. S. naval vessel, but because of her carrying troops from the United States to the combat area in France.

So also in *Wynnstay S. S. Co., Ltd., v. Board of Trade*, 23 Ll. L. Rep. 278 (K. B. 1925), there was a collision between the *Radcliffe* and the *Sylvan Arrow*, a unit of the U. S. Navy. Despite the fact that the *Sylvan Arrow* was a naval vessel and the nation was at war, it was held that the *Sylvan Arrow* was not at the time engaged in a warlike operation. Similarly in *Admiralty Commissioners v. Brynawel S. S. Co.*, 17 Ll. L. Rep. 89 (K. B. 1923), a collier was damaged by bumping into a British minesweeper while coaling her. Despite the fact that one of the vessels involved, the minesweeper, was a naval vessel, it was there held that the operation was not a warlike one.

Likewise, when the vessel is not a naval vessel at all, the loss is a marine risk loss unless it be proved that the vessel was actually engaged in a warlike operation. In many cases it is obvious that the vessel in question was so engaged. For example, in *British and Foreign Steamship Company, Ltd., v. The King* (1918) 2 K. B. 879, the *St. Ostwald* had been requisitioned by the British Admiralty for use as a transport in the evacuation of troops from the Gallipoli Peninsula. While so engaged she collided with another ship. It was there held that the *St. Ostwald* was engaged in a warlike

operation at the time of the collision.

In *Yorkshire Dale Steamship Co., Ltd., v. Minister of War Transport,* (1942) A. C. 691, 58 T. L. R. 263, the *Coxwold* had been chartered to the Minister of War Transport of Great Britain and was stranded while proceeding in convoy from Scotland to Narvik, Norway. She was carrying a cargo of petrol in tins for the use of the British Forces in Norway. It was there held that the *Coxwold* was engaged in a warlike operation.

In *Attorney-General v. Adelaide Steamship Co., Ltd.,* (1923) A. C. 292, the *Warilda* was requisitioned for use by the British Admirality. She collided with another ship while carrying some 600 wounded men and doctors from France to England. At the time the *Warilda* was proceeding at full speed under blackout conditions. It was there held that she was engaged in a warlike operation.

In *Liverpool and London War Risks Assn., Ltd., v. Ocean S. S. Co., Ltd.,* (1948) A. C. 243, the *Priam* was requisitioned by the Minister of War Transport of Great Britain. She was damaged by wind and wave while carrying a cargo, 78.5 per cent of which was war stores, from Great Britain to the British war base in Alexandria. At the time of her damage she was, contrary to peacetime practices, traveling at a high speed through rough seas, zigzagging, and was blacked out. It was there held that the *Priam* was engaged in a warlike operation.

We submit that it is impossible to liken the *Roustabout* to the *St. Ostwald* engaged in the perilous evacuation of troops from the Gallipoli Peninsula, to the *Coxwold,* proceeding through the dangerous waters of the North Sea carrying gasoline for the use of British combat troops in Norway, to the *Warilda* carrying wounded men directly from the battlefields of France across the English Channel to England, nor to the

Priam, carrying its cargo of war stores to the British Forces in Africa.

Leading cases in which it was held that the vessel in question was not engaged in a warlike operation are:

Britain S. S. Co., Ltd., v. The King, (1921) 1 A. C. 99;
Green v. British India Steam Nav. Co., Ltd., (1921) 1 A. C. 99;
Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co., 263 U. S. 487, 68 L. ed 402 (1923).

In *Britain S. S. Co., Ltd., v. The King*, supra, the *Petersham* was in charter to the British Admiralty. It was lost in consequence of a collision while steaming in convoy without lights on a voyage from Bilbao to Glasgow, Scotland, with a cargo of iron ore. It was there held that the *Petersham* was not engaged in a warlike operation.

In *Green v. British India Steam Nav. Co., Ltd.*, supra, the *Matiana* was stranded while sailing from Alexandria for a British port with a cargo of cotton. She was sailing in a convoy under an escort of four naval vessels on a course not sailed in peacetime. It was there held that the *Matiana* was likewise not engaged in a warlike operation.

In *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, supra, the *Napoli* was sailing from New York for Genoa, Italy, with a cargo of contraband material for the Italian Government. At Gibraltar she joined a convoy commanded by an Italian naval officer and escorted by British, Italian and American naval vessels, all of the ships in the convoy sailing without lights and zigzagging. The convoy in which the *Napoli* was sailing met another convoy and in the resulting confusion the *Napoli* collided with a ship in the other convoy and was sunk. (The facts of this case are taken

from 278 Fed. 770.) It was held in the trial court that the *Napoli* was not engaged in a warlike operation and the decision that the loss was not a war risk was affirmed by the United States Supreme Court.

If the *Petersham*, the *Matiana*, and the *Napoli* were *not* engaged in warlike operations, then, we submit, the *Roustabout* was a fortiori not so engaged. The *Petersham* was steaming without lights in submarine-infested waters; the *Matiana* was sailing without lights in a convoy under naval escort in waters made hazardous by submarines, and the *Napoli* was sailing without lights in a convoy under Italian command, escorted by British, Italian and American naval vessels and with a cargo, entirely contraband, and consisting in part of actual munitions of war. In each case, however, the ship in question was held not to have been engaged in a warlike operation.

Can it be urged that the *Roustabout* would have been held to have been engaged in a warlike operation by the courts which decided the *Petersham*, the *Matiana* or the *Napoli* cases? She was not sailing in convoy; she was not under naval escort; she was not in hostile waters; she was not blacked out, and she was not carrying a warlike cargo. In short, she lacked every characteristic which could have supported a decision that the *Petersham* or the *Matiana* or the *Napoli* was engaged in a warlike operation.

It is to be noted, too, that the *Roustabout* was no more subject to orders of governmental authorities than was the *Petersham*, for that vessel was operating under charter to the British Admiralty at the time of its collision.

At the trial of this matter, appellees sought to prove the character of the dry cargo, if any, of the *Roustabout* at the time of her collision by introducing evidence as to the character of cargo which she had from

time to time carried southward. It will be readily recognized that such evidence is incompetent for that purpose. The court, however, found as follows: (Ap. 48)

> ". . . that on southbound trips from said naval bases in the Territory of Alaska the said *U.S.S. Roustabout* engaged in carrying cargo consisting of freight offered by the Navy or Coast Guard, empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles, and at the time of said collision, the said vessel had aboard water ballast and miscellaneous dry cargo of the nature just above described."

As to the finding concerning the cargo which was actually aboard the *Roustabout* at the time of the collision, it is conceded by all that she was proceeding in ballast. As to the dry cargo, however, which she had aboard, the only direct testimony as to the nature of that cargo was given by Lawrence A. Parks, the Captain of the *Roustabout* at the time of its collision. His testimony upon cross-examination was as follows: (Ap. 110)

> Q. And the vessel at that time had only aboard water ballast to make navigation of it convenient and some miscellaneous dry cargo which you had picked up at these various ports?
>
> A. That is right.
>
> Q. Dry cargo which probably was primarily oil drums and containers of that type and miscellaneous things that they wanted returned to Seattle?
>
> A. That is right."

This is the only testimony in the record concerning the character of the cargo, if any, actually being carried by the *Roustabout* at the time of its collision, and it is testimony merely that such cargo was *probably* aboard.

It is hence to be seen that there was clearly a failure of proof as regards the identity of the cargo, if any, of the *Roustabout* at the time of its collision, and the finding of the trial court as to the character of that cargo is hence not supported by the evidence.

Even if it were to be accepted that what was "probably" aboard was as a matter of fact actually aboard, it is clear from the decided cases that a vessel carrying such cargo is not engaged in a warlike operation. For example, in *Clan Line Steamers, Ltd., v. Board of Trade,* (1929) A. C. 514, the *Clan Matheson* was bound from New York to Nantas with a cargo of which 84 per cent consisted of civilian stores and 16 per cent was for the military authorities. It was there held that the *Clan Matheson* was not engaged in a warlike operation despite the fact that a considerable part of its cargo consisted of materials which were admittedly for use by the military authorities at its destination.

In *Harrisons, Ltd., v. Shipping Controller,* (1921) 1 K. B. 122, the *Inkonka* ran aground while carrying hospital stores for the British government and a few British troops from Salonica to Taranto in Italy. It was there held that the *Inkonka* was not engaged in a warlike operation.

Here again it should be pointed out both the *Clan Matheson* and the *Inkonka* had been requisitioned by the British Admiralty and hence were operating under its orders just as much as the *Roustabout* was acting under the orders of the U. S. Navy. Despite that fact, the courts made no reference to the requisitioning of those vessels as tending to support the view that they were engaged in warlike operations.

We submit that the *Roustabout,* when returning to Seattle from Sitka in ballast, was engaged in a far less warlike operation than the *Clan Matheson* or the *Inkonka,* even though the evidence in the trial below

were capable of supporting a finding that the *Roustabout* was then carrying a dry cargo of the type enumerated by the trial court in its findings.

It is clear from the cases that, even had the *Roustabout* been carrying a damaged airplane, the most warlike of its possible cargo, she would, nevertheless, have not been engaged in a warlike operation. In *Clan Line Steamers, Ltd., v. Liverpool & London Insurance Assn.*, (1943) K. B. 209, 58 T. L. R. 369, the *Clan Stuart* collided with the *Orlock Head*, which was proceeding from England to France with a cargo which consisted principally of steel rounds intended for the making of shells to be used by the French army. It was there held that the carriage of such material was not a warlike operation. The court said in that case at 58 T. L. R. 371:

> "The cargo was not a cargo of military equipment or stores. The cargo would be useless to an army. It was not destined for an army. It was not being taken to an army, or to any place where it was to be available for an army. Is it possible to regard the voyage as a warlike operation, or as part of a warlike operation, merely because the cargo was intended to be of use in future operations after it had been turned into shells?"

It can be said with equal force that a damaged airplane being returned to the United States for salvage was not being taken to an army, nor to any place where it was to be available for an army. In its damaged condition it would, as a matter of fact, have been useless to an army.

In *Nordling v. Gibbon*, 62 F. Supp. 932 (1945 S. D. N. Y.) the *Cassimir* collided with another vessel and was sunk at a time when she was sailing from Cuba to Baltimore with a cargo of Cuban invert molasses which was owned by the Defense Supplies Corporation, an instrumentality of the United States government.

This cargo of molasses was to be distilled into alcohol for the manufacture of smokeless powder and other war materials. At the time, the *Cassimir* was completely blacked out. It was there held that the *Cassimir* was not engaged in a warlike operation. At Page 1083 the court said:

> "... although the cargo was ultimately intended to become a part of munitions of war, the carriage of it would not be a warlike operation unless such cargo at the time of the occurrence was of such kind as to be then capable of use by the armed forces. That it had to be processed, as here, first into alcohol, and then into smokeless powder, would be too remote."

It is submitted that the carriage of damaged equipment back to the United States for salvage is no less remotely a warlike operation than the carriage of materials required in the manufacture of steel shells or smokeless powder.

It might be urged here that the *Roustabout* was engaged in a warlike operation when sailing southward by virtue of the fact that she may arguably have been so engaged while sailing northward. This argument, however, fails in two respects. It is in the first place extremely doubtful that the *Roustabout* was engaged in a "warlike operation" within the contemplation of that phrase in a policy of marine insurance, even when she was proceeding northward. Her cargo of petroleum products was used, not by combatant forces, but simply by patrol planes and boats in the Southeastern Alaska sector, an area some 2,000 miles from the nearest enemy-held territory. When proceeding northward, as when proceeding southward, the *Roustabout* sailed in the protected waters of the Inside Passage. She sailed without escort and with navigation lights burning brightly. She had for her assistance all the peacetime navigation aids. She sailed alone and without

zigzagging and finally, as was testified to by the captain of the *Roustabout* (Ap. 108) not only was the *Roustabout* never subject to enemy attack, but neither an enemy plane nor an enemy vessel was ever sighted.

Even if it be held that the *Roustabout* was engaged in a warlike operation while proceeding northward, it is clear from the decided cases that the character of her southward voyage was not ipso facto also a warlike operation.

The House of Lords case of *Larrinaga Steamship Co., Ltd., v. Regem* (1945) A. C. 246, 61 T. L. R. 241, is precisely in point. In that case the *Ramon de Larrinaga* had been requisitioned by the Crown and had made two trips from England to British war bases in France with cargoes for military use. After having discharged her second cargo at a French port, the ship was ordered to leave that port at once in order to join a convoy at a specified place for the purpose of returning to England. While carrying out those orders, the vessel was stranded. In that case the House of Lords held that the *Ramon de Larrinaga* was not engaged in a warlike operation upon her return voyage even though she was admittedly so engaged while bound from Britain for France.

In that case Lord Peter said at 61 T. L. R. 243:

> "There is abundance of authority in your Lordships' House that a ship engaged in carrying war stores from one war base to another, or indeed in carrying war stores to a war base, is engaged on the warlike operation of proceeding through the water to her appointed discharging port. For this proposition it is sufficient to cite the authorities referred to in *Yorkshire Dale Steamship Company, Ltd., v. Minister of War Transport (The Coxwold)*, (58 T. L. R. 263 [1942] A. C. 691).

While, then, the *Ramon de Larrinaga* was pro-

ceeding to Nantes or to St. Nazaire laden with war stores, she was engaged in a warlike operation and a loss consequent on so proceeding would be a war loss. But that is not the position in which the damage occurred. The vessel had completed her discharge and was on her way to undergo her off-survey with a view to terminating the requisition and charter. None of the decided cases has gone so far as to declare such a voyage a warlike operation, nor do the principles on which they were decided require any such result. It was sought to support the appellants' argument by speaking of a round voyage or a voyage out and home as being part of the same operation, and contending that the whole voyage must be included among warlike operations if part was of that character . . .

The error in the general argument consists, I think, in looking on a round voyage or a voyage out and home as necessarily partaking of the same character throughout. This is not so; indeed, the appellants were constrained to admit that if the *Ramon de Larrinaga*, instead of being sent home in ballast, had been sent on a commercial voyage, she would have ceased the carrying out a warlike operation, yet, being so occupied, she might be proceeding on some portion of a round voyage or on the homeward part of a voyage out and home. For the purpose of the contractual relations between owners and charterers an agreement to perform a round voyage or a voyage out and home differs from an agreement to perform a single voyage, but for the purpose of ascertaining whether on a particular portion of the voyage the adventure on which the ship is engaged is warlike or peaceful the difference is immaterial. A voyage in ballast to a home port for the purpose of an off-survey is clearly not a warlike operation, and none the more so though the vessel engaged was performing a warlike operation on her voyage out."

The decided cases also make it clear that the character of any particular voyage is not determined by what may be in store for that vessel subsequent to the loss in question. For example, in *Wharton v. Mortleman*, 57 T. L. R. 514 (C. A. 1941), the *Brandonia*, a merchant vessel, collided with the *Alderpool*, which had been requisitioned by the British government for military service and was proceeding from Tyne to Southampton in England for orders. It was the uncommunicated intention of the Admiralty to employ the *Alderpool* after her arrival in Southampton for the purpose of transporting materials of war for the use of the British army overseas. Despite the fact that the *Alderpool* was to have been used in a warlike operation upon her arrival in Southampton, it was held that she was not engaged in a warlike operation at the time of the collision.

Ard Coaster, Ltd., v. The King, 36 T. L. R. 555 (1920) and *Wymnstay S. S. Co., Ltd. and W. I. Radcliffe S. S. Co., Ltd., v. Board of Trade* (1925) 23 Ll. L. Rep. 278, well illustrate the principle that the character of a vessel's operation is determined by the circumstances of the vessel and voyage at the time of loss.

The *Atheltemplar* was a tanker which had been requisitioned by the Ministry of War Transport of Great Britain. The *Sylvan Arrow* was a tanker which had been requisitioned by the government of the United States and was "a unit of the United States Navy for the carriage of fuel for war vessels." Both vessels were damaged by collision with another vessel while at anchor, but in one case the loss was held to have been a marine risk loss, whereas in the other case the loss was held to have been a war risk loss. In the case of the *Atheltemplar*, that vessel had left Trinidad for Scapa Flow with a cargo of fuel oil. At the time of her loss she was anchored in the harbor of Lochalsh in

Scotland. In the case of the *Sylvan Arrow*, that vessel had returned in ballast and at the time of collision was prepared to take on more oil. In the latter case it was held that the *Sylvan Arrow* was not engaged in a warlike operation, whereas in the former case it was held that the *Atheltemplar* was engaged in a warlike operation since she was still on her voyage to Scapa Flow.

We submit, therefore, that the trial court was in error in finding that the *Roustabout* was engaged in a warlike operation. Upon the authority of the decided cases, she was plainly not so engaged and the loss incurred by the *Eastern Prince* must hence fall upon the marine rather than war risk underwriter.

b. The Collision Between the Eastern Prince and the Roustabout Was Not Proximately Caused by a Warlike Operation and the Loss Was Hence Not a War Risk Loss.

Specification of Error: 2. The court erred in its conclusion of law that the collision and damage resulting therefrom to libelants' vessel, the *M.V. Eastern Prince*, was a consequence of warlike operations of the *U.S.S. Roustabout*.

Specification of Error: 3. The court erred in its conclusion of law that the collision between the *M.V. Eastern Prince* and the *U.S.S. Roustabout* was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the *M.V. Eastern Prince* and that libelants were entitled to judgment against respondent upon that policy of insurance.

It is the contention of the appellant that the *Roustabout* was not engaged in a warlike operation at the time of her collision with the *Eastern Prince*. Even if she had been so engaged, however, the resultant loss would not have been a war risk loss since that loss was not proximately caused by the warlike operation.

The many cases already cited, which have held that a loss was a marine risk loss, even though occurring during the course of a war, demonstrate that a collision *in* wartime is not the equivalent of a collision in consequence of a warlike operation.

The necessity for a casual relationship between the warlike operation in progress and the loss incurred may best be illustrated by *Yorkshire Dale Steamship Co. Ltd. v. Minister of War Transport* (1942), A. C. 691, 58 T. L. R. 263. In that case the *Coxwold* was proceeding in convoy and was carrying petrol for use of the British forces in Norway. While so operating the *Coxwold* ran aground. Prior to the loss the convoy had made an alteration in its course in order to avoid what was thought to be an enemy submarine. Had this alteration in course not been made the *Coxwold* would not have gone aground. In that case the Lord Chancellor said at 58 T. L. R. 264:

> "It has been laid down that a vessel like the *Coxwold*, which was carrying munitions of war from one war base to another, is 'engaged in a warlike operation' and this was expressly admitted by the respondent in the present case. This, however, is an entirely different thing from saying that any and every accident which happens to such a ship during her voyage is the consequence of a warlike operation. To suggest the contrary would be just as illogical as to say that if a postman, while engaged in the operation of delivering letters, meets with an accident in the street, this is necessarily the proximate consequence of his delivery of letters.
>
> "Authority is hardly needed for the proposition that you do not prove that an accident is 'the consequence of' a warlike operation merely by showing that it happened 'during' a warlike operation. For example, if a commercial vessel while proceeding from one war base to another with munitions on board is destroyed while at sea by acci-

dental fire, the cause of which is quite unconnected with the nature or method of her journey or the nature of the cargo she carried, I should suppose that it could not be said that her destruction was proximately caused by the warlike operation. So with collision. Lord Justice Crutton was plainly right when he said in *Clan Line Steamers v. Board of Trade* (44 T. L. R. 784 at page 786; [1928] 2 K.B. 557 at page 567) that 'the question to be decided is: Was the collision a consequence of a warlike operation—not, did it happen in the course of a warlike operation; not is a warlike operation one of the events which in their totality contributed to the collision, but was the collision a consequence of a warlike operation in the sense in which that expression is understood in insurance matters?' If Lord Dunedin's use of the syllogistic form in *Attorney General v. Ard Coasters* (37 T. L. R. 692 at page 695; [1921] 2 A.C. 141 at page 152) were to be understood as stating that anything that happens during a warlike operation is a consequence of it, that passage contains a slip in reasoning, and is no essential part of the decision. Lord Sumner, in *The Warilda* (39 T. L. R. at page 336, [1923] A.C. 292 at page 305) put the true test when he asked whether the collision was caused 'effectively and proximately' by the warlike operation."

At page 265 the Lord Chancellor concluded:

" . . . where the finding is that so substantial a deviation from the normal course was ordered for the express purpose of avoiding an enemy submarine, and was not subsequently corrected, there is no reason for saying that the arbitrator, in finding that the loss was the direct consequence of a warlike operation, was disregarding what had already laid down by this house."

Lord MacMillan said at page 266:

"It is agreed that the *Coxwold* when she ran aground on the coast of Skye was engaged in a warlike operation. But to place liability on the

> Minister it is not enough that the casualty arose in the course of a warlike operation. It must also arise out of and be proximately caused by the warlike operation."

Lord Porter said at page 270:

> "In the present case it has been thought by the Court of Appeal, as I understand them, that the arbitrator found the sole, or at any rate the dominant, cause of the loss to be an unexpected set of the tide, and that such a cause was a definite external event unconnected with the warlike operation. I do not so understand him. One must, I think, take the whole story—a ship sailing on a warlike operation at a speed in dangerous waters where unexpected currents might be found, in convoy without lights, following an ordered course and deviating from it again under orders for the purpose of avoiding actual or imagined submarine attack."

The *Moor Line, Ltd. v. Isaac King et al.*, 4 Ll. L. Rep. 286 (K. B. 1920) very neatly demonstrates that a loss is not a war risk loss unless it was incurred because of the war operation. In that case the *Exmoor* swerved to avoid a floating mine and was stranded. Normally such a stranding would be held to be a war risk loss. As the evidence revealed, however, the *Exmoor* would have run aground had she not swerved, but had continued on her course, and the court held that on those facts the loss was a marine risk loss. In other words the court held that the loss was not a war risk loss since it would have occurred in the absence of the warlike element present in the factual situation.

In the case of the collision before this court the only possible warlike element was the nature of the "probable" cargo of the *Roustabout*. That "probable" cargo, however, in no respect *caused* the collision nor even increased the likelihood of that occurrence.

The requirement that a loss must be proximately caused by a warlike operation in order for that loss to be a war risk loss is best demonstrated by *Liverpool and London War Risks Assn. v. Ocean Steamship Co., Ltd.* (1948) A. C. 243. In that case the *Priam*, which had been requisitioned by the British Minister of War Transport, was dispatched from Britain to the British war base in Alexandria by way of the Cape of Good Hope. Her cargo of 6846 tons was 78.5% war stores. On her deck was stowed such war cargo as airplanes and a bridge-laying tank. Contrary to peacetime practice the *Priam* took a course directly out into the North Atlantic and zigzagged while under way. She then ran into heavy weather but, contrary to peacetime practice, continued to zigzag and maintained a much higher speed that she would have maintained in the absence of the menace of submarines. While the *Priam* was so steaming (1) her deck cargo came adrift and damaged the vessel, (2) water entered the forepeak, causing damage there, and (3) water caused damage to the afterwell deck and poop.

On appeal, the House of Lords held that only the damage caused by the deck cargo coming adrift was a war risk loss, the rest being simply a marine risk loss. This decision, which divides the losses suffered by the same vessel at the same time on the same voyage, of course, makes incontrovertible the fact that a loss suffered by a vessel engaged in a warlike operation is nevertheless a marine risk loss unless the warlike operation was the proximate cause of that loss.

In the House of Lords decision Lord Wright said at (1948) A. C. 254:

> "While I agree that it is now settled by a number of decisions in this House and last of all in *Yorkshire Dale Steamship Company, Limited v. Minister of War Transport (The Coxwold)* that

> a vessel in wartime sailing from one war base to another with a cargo of war stores is engaged on a warlike operation, it has not been laid down except in general terms that every loss which occurs on such a voyage is to be treated as a war loss."

At (1948) A. C. 258, Lord Wright went on to say:

> "If the true effect of the F. C. & S. Clause is to exclude every sort of marine damage occurring while the ship was engaged on a warlike adventure then, as it seems to me, the marine policy is simply otiose during that adventure. But no one has gone so far as that."

The *Priam*, of course, sustained all of her damage while she was engaged in a warlike operation. The House of Lords held, however, that the war risk underwriter became liable for only that portion of the loss which was proximately caused by the warlike operation, i.e., the breaking adrift of the war materials stowed on deck.

As regards causation the English cases have been made somewhat ambiguous by dicta to the effect that every loss incurred in the course of a warlike operation is ipso facto a war risk loss. For example, in *Attorney General v. Adelaide S. S. Co. Ltd.* (1923) A. C. 292, Lord Sumner spoke to that effect. In the *Priam* decision, however, Lord Wright said at (1948) A. C. 259:

> "It is now clear that Lord Sumner's dictum ([1923] A. C. 292) that as was the whole, so were the parts cannot be applied without qualification."

The American cases, however, are not equivocal as regards the element of proximate cause. In an unbroken line of cases, dating from *Morgan v. United States*, 81 U. S. 531, 20 L. ed. 738 (1872) to the present time, the American courts have been unanimous in holding the loss to be a war risk loss only if

that loss was proximately caused by a warlike operation.

In *Queen Ins. Co. of America v. Globe & Rutgers Fire Ins. Co.*, 263 U. S. 487, 68 L. ed. 402 (1923), the *Napoli* was an Italian steamer sailing from New York to Genoa with a cargo of contraband for the Italian Government. At Gibraltar she joined a convoy and thereafter, while sailing in convoy, she collided with a vessel in a westbound convoy. Both convoys were under the command of Italian naval officers. Both were escorted by British, Italian and American naval vessels. All vessels were without lights. About five hours prior to the collision a vessel in the westbound convoy had been torpedoed and that convoy had begun to zigzag. As a result of the zigzagging, that convoy was off of its original course. (Facts from 278 Fed. 770.) Despite all these elements connecting the loss incurred with the operation being carried on, our Supreme Court held that the loss was not a war risk loss. That court, speaking through Justice Holmes, said at 68 L. ed. 402 at 404:

> ". . . the common understanding is that, in construing these policies, we are not to take broad views, but generally are to stop our inquiries with the cause nearest to the loss."

On the same page the court went on to say:

> ". . . we are dealing not with general principles, but only with the construction of an ancient form of words which always have been taken in a narrow sense, and in *Morgan v. United States* were construed to refer only to the nearest cause of loss, even when there were strong grounds for looking beyond it to military command."

Since the *Napoli* case, our Supreme Court has not again addressed itself to the question now before this court. The Federal courts which have been confronted with this problem have hence uniformly held, in ac-

cordance with that decision, that a loss, though incurred in a warlike operation, is not a war risk loss unless proximately caused by a warlike operation.

For example, in *Standard Oil Co. v. St. Paul Fire and Marine Insurance*, 59 F. Supp. 470 (S. D. N. Y. 1945), the *Petter* was a Norwegian tanker which was chartered for a voyage from Texas to Havre, France. The *Petter* was convoyed across the Atlantic. After she left the convoy the *Petter* proceeded to Brest and was there allowed by the French authorities to proceed to Havre. Off Havre the master heard a bombardment and put to sea again. Later the *Petter* was anchored off Havre but a French patrol boat came alongside and ordered her to leave as quickly as possible. She was then anchored near Brest until a British patrol boat warned her of the approach of the Germans and suggested that she proceed to Falmouth, England. Upon the arrival of the *Petter* off Falmouth the master signaled for a pilot since the waters of Falmouth Harbor had been mined. A patrol boat flying the British naval ensign signaled the *Petter* to "follow me," and, while obeying that signal, the *Petter* struck a submerged rock and was damaged.

Despite the fact that the *Petter* was clearly engaged in a warlike operation, it was held that the loss was a marine risk loss. The court said at 59 F. Supp. 474:

> "It is well settled that the fact that there is a war in progress, or that there are surrounding circumstances of war, in and of themselves, are not sufficient to exclude coverage under a policy containing an F. C. & S. clause, but it must be shown that a cause of loss contemplated by such a clause was the cause 'nearest to the loss.' "

The case of *Ferro v. United States Mail Lines and United States of America*, 74 F. Supp 250 (S. D. N. Y. 1947), was concerned with a war risk policy of insur-

ance upon an individual rather than upon a vessel. The policy in question insured the decedent "against loss of life . . . directly or proximately caused by risks of war and warlike operations, including capture, seizure, destruction by men-of-war, sabotage, piracy, takings at sea, arrests, restraints and detainments, acts of kings . . ." In that case the decedent committed suicide by jumping overboard at a time when his ship was en route to Australia by way of the Panama Canal. It was there held that there was no causal relationship between the death of the decedent and a warlike operation, and that there could hence be no recovery under the policy.

In *Daronowich v. United States of America*, 73 F. Supp. 1004 (S. D. N. Y. 1947), the ship of the decedent was torpedoed and sunk. The decedent escaped in a lifeboat and was picked up by a mine-sweeper, which transferred him to a coastal rescue vessel, which in turn transferred him to a destroyer. Subsequently the decedent was washed overboard from the destroyer during rough weather. Despite the fact that the destroyer was arguably engaged in a warlike operation, the court said at 73 F. Supp 1006:

> "Even if, under most liberal interpretation, it might be considered that the (destroyer) was engaged in a warlike operation while transporting the rescued seaman and that (decedent) lost his life during such warlike operation, there is no evidence justifying the conclusion that his loss of life by being swept overboard, as claimed by libellant, or otherwise, was 'directly occasioned' by the warlike operation."

Two recent American cases, involving vessels rather than persons, reveal that the requirement of proximate cause is not confined to the war risk insurance of individuals. In *Meseck Towing Lines v. Excess Insurance Company, et al*, 77 F. Supp. 790 (E. D. N. Y.

1948), the tug *Meseck* was damaged by a collision with the United States naval vessel S. C. 1294, a sub-chaser, in New York harbor. The tug was covered by a marine risk policy having an F. C. & S. clause. The S. C. 1294 was manned by naval officers and men, and was armed with one 40-mm. and two 20-mm. anti-aircraft guns, approximately twelve 300-pound depth charges and one set of "Mouse-Trap" forward throwers. At the time of the collision the S. C. 1294 was proceeding out of New York harbor to take up her anti-submarine patrol duties south of Ambrose Light Vessel. It was found that the collision occurred through mutual fault.

In this case it was held that the loss was a marine risk loss despite the fact that the S. C. 1294 may have been engaged in a warlike operation at the time of the collision.

Finally, *Atlantic Refining Co. v. United States*, 74 F. Supp. 516, 1948 A. M. C. 94 (1948), concerned the stranding of the *E. H. Blum*, a tanker with a capacity of 19,200 tons and a length of 523 feet. The *E. H. Blum* had been chartered by the United States. At the time of the stranding, the *E. H. Blum* was carrying a load of crude oil from Texas to Philadelphia. She was off course but would have been aware of that fact had not certain peacetime radio beacon lightships been removed because of the war. Because of a provision in the charter party the issue arose as to whether the stranding had been "caused or contributed to by war or warlike acts." The court held that the removal of the radio beacon lightships was a warlike act and that, moreover, that warlike act "contributed" to the stranding of the *E. H. Blum.*

If the circumstances surrounding the *Eastern Prince-Roustabout* collision are examined, it becomes apparent that there was no causal relationship whatsoever between the war or any warlike operation and

the damage suffered by the *Eastern Prince*. Had the collision occurred because one or both ships were proceeding without lights, or because one or more shore navigational aids had been extinguished, or because one or both ships were traveling at a higher rate of speed than would have been normal in peacetime, or because one or both ships were zigzagging, or because one ship mistook the other for an enemy vessel and sought to ram it, then could it be held that the loss was proximately caused by the warlike operation. It is clear from the evidence, however, that the collision in question resulted from no such consequence of war. Neither ship had extinguished its normal peacetime running lights, all aids to navigation ashore were in operation, neither vessel was proceeding at a speed greater than normal, neither was zigzagging, and neither mistook the other for an enemy vessel.

In *John Peters v. The Warren Ins. Co.*, 14 Pet. 99, 10 L. ed. 371, Justice Story, in speaking of marine insurance, said at 14 Pet. 109:

> "If there be any commercial contract which, more than any other, requires the application of sound common-sense and practical reasoning in the exposition of it, and in the uniformity of the application of rules to it, it is certainly a policy of insurance; for it deals with the business and interests of common men, who are unused to deal with abstractions and refined distinctions."

This same sentiment was expressed by Judge Cardozo in *Bird v. St. Paul Fire and Marine Ins. Co.*, 224 N. Y. 47, 120 N. E. 86 (1917). In that case the owner of a vessel sought to recover upon a policy of insurance which covered explosions but not fires. The facts of the case were that a fire broke out under certain railway cars containing explosives. The contents of the cars exploded, causing another fire, and another and much greater explosion took place damaging the

plaintiff's vessel some one thousand feet away. It was held by the court that the damage was done by explosion rather than fire. In discussing the element of causation, Judge Cardozo said at 120 N. E. 87:

> "The problem before is not one of philosophy. Pollocks, Torts (Kents ed.) page 37. It it were, there might be no escape from the conclusions of the court below. General definitions of a proximate cause give little aid. Our guide is the reasonable expectation and purpose of the ordinary business man when making an ordinary business contract. It is his intention, expressed or fairly to be inferred, that counts."

Authority and reason combine to deny that the *Roustabout* was engaged in a warlike operation at the time of the collision in question; yet, even if it be found by this court that the *Roustabout* was so engaged, the most that can then be found is that the loss occurred *during* a warlike operation—and such a finding is insufficient to impose liability upon the war risk underwriter. For the loss to be a war risk loss, it must be found that the loss not only occurred *during* a warlike operation, but that it was *caused* by that warlike operation.

We submit, therefore, that, even if it be found that the *Roustabout* was engaged in a warlike operation, the collision was not caused by that operation and the loss hence cannot be a war risk loss.

c. The Eastern Prince Was Entirely at Fault in the Collision and Hence the Loss Cannot Be a War Risk Loss.

Specification of Error: 6. The court erred in finding that at the time of said collision the *U.S.S. Roustabout* and the *M.V. Eastern Prince* were both at fault.

Specification of Error: 7. The court erred in finding that the said collision occurred by reason of the mutual fault of both vessels..

Specification of Error: 3. The court erred in its conclusion of law that the collision between the *M.V. Eastern Prince* and the *U.S.S. Roustabout* was one within the coverage of the "war risk" policy of insurance issued by the respondent upon the *M.V. Eastern Prince* and that libelants were entitled to judgment against respondent upon that policy of insurance.

As has already been shown in this brief, the loss from a collision between a vessel upon a warlike operation and one upon a peaceful operation falls upon the marine risk underwriter if the vessel upon the peaceful operation was entirely at fault.

The evidence introduced at the trial of this matter cannot support the findings of the trial court that the *Roustabout* and the *Eastern Prince* were both at fault, for that evidence reveals that the *Roustabout* was herself blameless..

The testimony of Captain Parks, who was on the bridge of the *Roustabout* at the time of the collision, was that the only lights visible upon the *Eastern Prince* were three white lights (Ap. 111), and that neither its green nor its red navigating light was visible (Ap. 113). This testimony of Captain Parks as to the lights upon the *Eastern Prince* was corroborated by Marvin S. Beasley, the bow lookout upon the *Roustabout*, who testified that only white lights were visible upon the *Eastern Prince* (Ap. 209), and his testimony was that there were at least half a dozen such white lights burning on the *Eastern Prince* as the *Roustabout* approached her.

The testimony of the men of the *Roustabout* concerning the number of white lights visible upon the *Eastern Prince* was corroborated not only by Dean Mills of the *Eastern Prince*, who testified (Ap. 133) that there were two white lights hanging under the overhang of the bridge, but by Captain Rose of the *Eastern Prince*,

who testified that there were four such white lights (Ap. 169).

On the basis of this evidence the court specifically found that the *Eastern Prince* was at fault for its failure to exhibit red and green navigation lights as required by law (Ap. 49).

Because of this failure of the *Eastern Prince* to exhibit the required running lights, the captain of the *Roustabout* was misled as to the direction in which the *Eastern Prince* was proceeding. As Captain Parks of the *Roustabout* testified (Ap. 119), the lights which the *Eastern Prince* exhibited were precisely the same as the lights exhibited by a vessel being overtaken by the *Roustabout.*

Now when one vessel is overtaking another vessel, the former is required only to keep out of the way of the overtaken vessel. Title 33 U. S. C. A. Sec. 109 provides as follows:

> "Notwithstanding anything contained in these rules every vessel, overtaking any other, shall keep out of the way of the overtaken vessel."

Captain Parks testified (Ap. 113) that as the *Roustabout* got closer to the *Eastern Prince,* he "hauled" the *Roustabout* farther to the left in order to allow more space in passing the *Eastern Prince.* This, of course, was done upon the mistaken assumption that the *Roustabout* was overtaking the *Eastern Prince*—and that assumption was in turn based upon the failure on the part of the *Eastern Prince* to exhibit the statutory running lights.

Had the *Roustabout* actually been overtaking the *Eastern Prince,* the course taken by Captain Parks would clearly have been proper. His only duty was "to keep out of the way of the overtaken vessel," and this he sought to do by changing his course to port.

In *The Scotia*, 81 U. S. 170, 20 L. ed. 822 (1892) it was held that when the defective lights of one vessel have caused another vessel to be deceived, the latter vessel is without fault if it was properly maneuvered upon that erroneous supposition.

In *Wariang v. Clarke*, 5 How 441, 12 L. ed. 226 (1846), the United States Supreme Court said at 5 How. 465:

> ". . . if a collision occurs between steamers at night, and one of them has not signal lights, she will be held responsible for all losses until it is proved that the collision was not the consequence of it."

In the present case the *Roustabout* was deceived by the lights of the *Eastern Prince* into thinking that the *Roustabout* was astern of the *Eastern Prince* and that she was overtaking the *Eastern Prince.* Since the *Roustabout* was properly maneuvered as an overtaking vessel, the *Eastern Prince* was alone at fault for the deception upon which the maneuvers of the *Roustabout* were predicated.

The trial court found (Ap. 49) that the *Roustabout* was at fault in "failing within sight of the *Eastern Prince* to indicate a change of course on her whistle." There is no rule, however, requiring an overtaking vessel to sound its whistle to indicate a change of course. Its only duty is to take steps to avoid the overtaken vessel. Whistle signals come into play when vessels are meeting end on, or nearly so, not when both vessels are on the same course. Title 33 U. S. C. A. Sec. 103 provides as follows:

> "When two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other."

Under the circumstances contemplated by the foregoing rule, whistle signals, of course, assume great importance, for both vessels are under a duty to change course, and it is hence important for each vessel to know that the other vessel has made the proper change in course. An overtaken vessel, on the other hand, is under no duty to change its course. Rather is it under a duty to maintain its course and speed. Title 33 U. S. C. A. Sec. 106 provides as follows:

> "Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed."

Being under a duty to "keep its course and speed," the overtaken vessel is not concerned with any changes of course on the part of a vessel overtaking it. That latter vessel has merely the duty of avoiding the overtaken vessel and need not signal any course changes it may adopt in doing so.

In the present case the *Roustabout* properly inferred from the absence of running lights on the *Eastern Prince* that that vessel was proceeding in the same direction as the *Roustabout*. Under those circumstances the *Roustabout* was under no duty to sound a whistle signal, and quite plainly the trial court was in error in finding that the *Roustabout* was at fault in failing to indicate a change of course by means of a whistle signal.

The court also found (Ap. 49) that the *Roustabout* was at fault in not keeping to the right of the channel. Now it is true that Title 33 U. S. C. A. Sec. 110 provides as follows:

> "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

It may also be admitted that the *Roustabout* was to the left of mid-channel, but that is not to admit that the collision was the result thereof.

Had the *Eastern Prince* exhibited its proper lights, the *Roustabout* would, of course, have perceived that the *Eastern Prince* was an oncoming vessel and would have changed its course to starboard in order to pass that vessel port to port. Because of the failure of the *Eastern Prince* to exhibit the proper running lights, however, the *Roustabout* was justified in concluding that the *Eastern Prince* was being overtaken by the *Roustabout*. On the basis of that justifiable conclusion, the *Roustabout* then had but one duty as regards the *Eastern Prince*, and that was the duty of avoiding her. The *Roustabout* was, under the rules, at liberty to pass to the starboard of the overtaken vessel or to her post just so long as the *Roustabout* kept out of the way of her.

Since the justly famous opinion of Judge Cardozo in the case of *Palsgraf v. Long Island Railway*, 248 N. Y. 339, 162 N. E. 99 (1928), it has been clear that there cannot be "negligence in the air." Negligence must be directed toward someone or some thing. The *Roustabout* would clearly have been negligent in not keeping to the starboard side of the channel had there been a vessel, known to the *Roustabout* as oncoming, for in that case the *Roustabout* would have been negligent toward that particular vessel.

Now, however, when the only other ship in the area was a ship which appeared not to be oncoming but rather to be proceeding in the same direction, the *Roustabout* was not at fault in not keeping to the starboard of mid-channel for, to the *Roustabout*, the overtaken vessel was herself keeping to the port of mid-channel, and the *Roustabout*, as regards that vessel, had only the duty of avoiding her.

Finally, the court found (Ap. 49) that the *Roustabout* was negligent in "failing to keep a proper lookout in that the lookout aboard the *Roustabout*, after sighting the red light of the *Eastern Prince*, took no action concerning same and failed to notify the officer on the bridge of the whereabouts of the *Eastern Prince*."

The very statement of this finding makes plain the fact that fault upon the part of the *Roustabout* cannot be predicated upon that finding. The captain of the *Roustabout* at all times knew the "whereabouts" of the *Eastern Prince*. His testimony was that he had seen the white lights of the *Eastern Prince* for some time prior to the collision, so that the likelihood of a collision would not have been lessened in the least had the bow lookout reported to the bridge the location of the other vessel in reference to the *Roustabout*. The captain was fully aware of the presence of that other vessel and its location. The only thing that he did not know was the course of that vessel.

The finding of the court was that there was fault on the part of the *Roustabout* because of the failure of its lookout to report the "whereabouts" of the *Eastern Prince*. We believe that finding cannot be interpreted to mean that the *Roustabout* was at fault in the failure of the lookout to report the "course" of the *Eastern Prince*. But, even if it be so interpreted, a finding of fault on the part of the *Roustabout* can no more be based upon the failure of the lookout to report the course of the *Eastern Prince* than it could be based upon the failure of the lookout to report the "whereabouts" of the *Eastern Prince*.

It is true that the *Roustabout* would have been at fault had its lookout been able to see the red running light of the *Eastern Prince*, as the *Roustabout* approached her, but had yet failed to notify his captain

of that fact. As testified to by the lookout, and as found by the court, however, no running light on the *Eastern Prince* was exposed to the view of the *Roustabout* as the two ships closed the water between them. The lookout testified that the only lights that were visible to him were white in color (Ap. 209). Since he could at that time see only white lights, he would, of course, have been in error in reporting that he had sighted a red light on the other vessel.

When the *Eastern Prince* changed its course so as to expose its red port running light to view, Captain Parks testified (Ap. 116) that he put the engines full speed astern and his ship's rudder hard left.

The bow lookout first became aware of the true course of the *Eastern Prince* when its change of course exposed its red port running light. At the same time, however, the captain of the *Roustabout* became aware of that true course of the *Eastern Prince*. There is no showing that Captain Parks would have given any engine orders or rudder commands other than the ones which he actually gave had he received a report from the bow that the other vessel's red port running light was visible. Such a report would only have corroborated that which he already well knew. Had the captain not have seen the red light when it was exposed by the change in course of the *Eastern Prince*, or had he mistaken that red light for a green light, or had he been doubtful as to whether that red light was a red port running light, then the failure on the part of the lookout to report that light would have been significant. In the present case, however, such a report would have had no effect other than to distract the captain of the *Roustabout* from his emergency efforts to avoid collision with a vessel which had, by its change in course, revealed itself suddenly and without warning as being,

not an overtaken vessel, but as a vessel proceeding in the opposite direction.

Unless it can be found that the captain of the *Roustabout* would have taken any steps different from those which he actually took had the bow lookout reported the sighting of the red port running light of the *Eastern Prince*, then fault on the part of the *Roustabout* cannot be founded upon the failure of the lookout to make such report.

Fault in the collision in question must be wholly attributed to the *Eastern Prince* for its failure to exhibit the lights required by statute. The *Eastern Prince* and only the *Eastern Prince* was at fault when her running lights were not visible. When, by a change in course, she finally exhibited those lights, the two vessels were in such a position of peril that even the emergency engine order of "full speed astern" and the emergency rudder command of "hard left rudder" given by Captain Parks were ineffective to avoid the collision which had been made almost inevitable by the deceptive appearance of the *Eastern Prince.*

We, therefore, submit that the *Eastern Prince* was alone at fault in the collision of the two vessels in question and that upon the principles already established in this brief the resultant loss was a marine risk loss rather than a war risk loss.

IV.

The Court Was in Error in Granting to Appellees Interest Upon Their Judgment From the 11th Day of September, 1942.

Specification of Error: 8. The court erred in granting to appellees interest upon their judgment from the 11th day of September, 1942, rather than from the date of entry of the final decree in this cause.

It is now well established in Admiralty suits arising out of collisions that it is discretionary with the trial

courts to grant interest upon a judgment from the time of its entry, from the time of the original collision or from some intermediate date.

In 1 Benedict on Admiralty, Section 419, it is said:

> "In Admiralty . . . the allowance of interest on damages in cases of collision or other unliquidated damages, is always in the discretion of the court and such interest may be allowed or disallowed by the District Court or on appeal by the Circuit Court of Appeals or by the Supreme Court."

In *The Scotland* (1885) 118 U. S. 507, 30 L. ed. 153, the Supreme Court said at 118 U. S. 518:

> "The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass on the subject, whether it be a court or a jury."

We submit that in the present case there are such facts and circumstances which would make inequitable and unjust a decree ordering the appellant to pay interest to the appellee from the date of the original collision.

The collision in question occurred on May 11, 1942, but the trial of the action was not brought on for hearing until July 16, 1947, over five years from the time that the cause of action arose. After that time the trial court took the matter under advisement and it was not until February 24, 1948, that the Findings of Fact and Conclusions of Law were signed. The final decree was not filed until May 20, 1948, or a period of six years since the date of the original collision.

If the appellant could be held responsible for the elapse of time between the collision in question and the entry of the final decree, it might be conceded that the granting of interest to the appellees from the date of that collision would not be inequitable. We submit,

however, that the responsibility for the long period of time intervening between the time the cause of action arose and its final determination cannot be placed upon the appellant.

After the collision on May 11, 1942, the record shows that the libelants filed their libel on September 17, 1942. Thereafter, on November 7, 1942, Respondent's Exceptions to the Sufficiency of the Libel was filed.

The Exceptions of Respondent were not noted down for hearing by the libelants until January 3, 1944. At that time the court granted the Respondent's prayer that certain portions of the Libelants' Libel be stricken. At the same time the court took under advisement the sufficiency in law of the libel and the necessity of the libelants joining one O. L. Grimes as an additional party libelant. On January 18, 1944, counsel for respondent stipulated that the libelant might add the said O. L. Grimes as an additional party libelant. The hearing which had begun on January 3, 1944, was continued on January 24, 1944, and was continued to January 31, 1944, at which time the argument was concluded and the matter was taken under advisement by the court. On April 12, 1944, counsel for respondent stipulated that the libelants might file an amended libel and such was thereafter filed by libelants. After the filing of the amended libel the court asked for reargument and the exceptions of the respondent were argued by counsel on May 11, 1944. On May 31, 1944, the court held that the amended libel stated a cause of action.

Thereafter, on September 8, 1944, the respondent filed its answer to the amended libel of the libelants. By filing its answer, the respondent thereby shifted back to the libelants, the moving parties, the responsibility of going forward with the action. In the meantime, various negotiations were taking place among

the libelants, the respondent, and the United States in an effort to reach a settlement satisfactory to all parties. Because of the pendency of these negotiations and the possibility of a mutually satisfactory settlement, libelants asked on October 7, 1946, that this case not be set for trial, but the courts nevertheless set the case down for trial on December 10, 1946.

This recital of the pertinent dates and events which have occurred since the collision in question establishes, we believe, that the respondent was not at fault and, therefore, should not be penalized for the delay which has occurred in the final determination of this controversy. Admittedly, the libelants would have a claim for interest from the time of the collision in question had they promptly noted down for hearing the exceptions of the respondent to their libel and had they promptly brought on for trial this action after the respondent had filed its answer to their libel. As it was, however, there was a delay of over a year between the times that the respondent filed its exceptions to the sufficiency of the libel of the libelants and the time that those exceptions were brought on for hearing. At the same time between September 8, 1944, the time that respondent filed its answer to the libel, and the trial of this action there elapsed almost three years.

At all times the libelants were in command of the conduct of the action. After the respondent had filed its exceptions respondent was without power to delay the hearing of those exceptions. In the same manner, after the respondent had filed its answer to the libel, it was without power to prevent the libelants from bringing the matter on for trial. That the libelants did not seek a more speedy determination of this matter indicates beyond question, we believe, that they considered it to be in their best interests to continue the negotiations which were in progress.

In the determination of whether interest should be granted to the libelants from September 11, 1942, or from the date of entry of this final decree, this court is again confronted with a factual question. There are on one hand cases which would support the granting of interest from the date of collision or from the date of demand. On the other hand there are many cases holding that interest should be granted only from the date of entry of final judgment. In this case, however, we submit that the long delay between the date upon which the cause of action arose and the entry of the final decree is more than adequate reason, in light of the fact that that delay was not due to the fault of the appellant, for denying to appellees, interest dating from the date of the collision.

V.

The Marine Insurance Underwriters Have Clearly Shown by Their Conduct That It Was Not Their Intent That Cases Such as the Present Should Be Considered War Risk.

As has been shown, language of marine insurance policies is to a very large degree traditional, representing forms of usage which have literally been passed on from generation to generation within the marine insurance industry. It is only with extreme reluctance that these forms are changed, but in the case of both American and British underwriters the F. C. & S. clause was changed in 1942 and 1943, respectively, to eliminate all question of collision such as here involved being considered as a war risk.

In the statement of the Overall War-Marine Risk Settlement Agreement (1945 A. M. C. 1014), this situation is summarized as follows:

> "The use of that clause (referring to the old form of F. C. & S. Clause) which dated from 1883, was generally discontinued in London in 1942-

1943 pursuant to an announcement of a new British Ministry of War Transport on November 15, 1942. (1943 A. M. C. 130). The 1942 British F. C. & S. Clause became effective on November 21, 1942, at and after noon, Greenwich Meridian Time, for all renewals of current policies and for all new underwritings in London.

Its use was generally discontinued in the New York market in 1943 pursuant to the announcement by the U. S. War Shipping Administration of the 'Wartime-hull Insurance Agreement (1943)' in April, 1943, which included a new 'American F. C. & S. Clause (1943).' The 1943 American Hull F. C. & S. Clause, effective on December 1, 1943, at 12:01 a.m. Eastern War Time, for all renewals of current policies and for all new underwritings in the U. S. A. (Note: A similar new American Cargo F. C. & S. Clause came into use on July 1, 1943.)

The ambiguities of the old clause, and the uncertainties and dissatisfactions resulting from its interpretation by the courts in the United States and in England, gave rise to many disputes which were temporarily handled by advances made without prejudice either by War Risk Underwriters, by the Marine Risk Underwriters, or 50-50 by both, pursuant to agreements known as the Missing Vessel Supplemental Agreements. The Overall Agreement provides for the postponed solutions of such cases."

The British Ministry of War Transport and the War Shipping Administration of the United States, in conjunction with the marine insurance industry, revised these clauses in 1942 and 1943 (1943 A. M. C. 130) (1945 A. M. C. 1035 and 1036).

The British revision in 1942 of the F. C. & S. clause was as follows:

"Warranted free of capture, seizure, arrest, restraint or detainment, and the consequences thereof or of any attempt thereat; also from the

consequences of hostilities or warlike operations, whether there be a declaration of war or not; *but this warranty shall not exclude collision, contact with any fixed or floating object (other than a mine or torpedo), stranding, heavy weather or fire unless caused directly (and independently of the nature of the voyage or service which the vessel concerned or, in the case of a collision, any other vessel involved therein, is performing) by a hostile act by or against a belligerent power;* and for the purpose of this warranty "power" includes any authority maintaining naval, military or air forces in association with a power. Further warranted free from the consequences of civil war, revolution, rebellion, insurrection or civil strife arising therefrom or piracy." (Italics ours)

In the case of the American clause, the revision was made more extended and specific, as follows:

"Unless physically deleted by the underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the policy:

1. Notwithstanding anything to the contrary contained in the policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the vessel, by requisition or otherwise, whether in time of peace or war, and whether lawful or otherwise, also from all consequences of hostilities or warlike operations (whether there be declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

2. For the purpose of this warranty the term "consequences of hostilities or warlike operations" shall be deemed to include the following:

a. Collision caused by failure, in compliance with wartime regulations, of the insured vessel

or any vessel with which she is in collision to show the usual full peacetime navigation or anchorage lights.

b. Stranding caused by the absence of lights, buoys or similar peacetime aids to navigation consequent on wartime regulations.

c. Stranding caused by the failure of the insured vessel to employ a pilot in waters where a pilot would ordinarily be employed in peacetime but in which the employment of a pilot is dispensed with in compliance with military, naval or other governmental orders, or with a view to avoiding imminent enemy attack.

For the purpose of this paragraph (2) any such failure to show lights, or absence of lights, buoys or similar peacetime aids to navigation, or failure to employ a pilot, shall be presumed to be the cause of the collision or stranding unless the contrary be proved, and stranding shall include sinking consequent upon stranding or contact with any part of the land.

d. *Collision with another vessel in the same convoy or collision with any military or naval vessel, that is to say, a vessel manned by and under the control of military or naval personnel and designed to be employed primarily in armed combat service.* (Italics ours)

e. Stranding, collision or contact with any external substance other than water (ice included) as a result of deliberately placing the vessel in jeopardy in compliance with military, naval or other governmental orders in order to avoid imminent enemy attack, or as an act or measure of war taken in the actual process of embarking or disembarking troops or material of war.

3. *The fact that the insured vessel or any vessel with which she is in collision is carrying troops or military or other supplies or is proceeding to or from a war base, or is manned or operated by military or naval personnel, shall not alone be*

sufficient to exclude from this policy any claim which is not excluded under the terms of Paragraph (2) above. (Italics ours)

4. Where by reason of any of the foregoing provisions damage sustained by the insured vessel in collision would not be payable under this policy, it is understood and agreed that liability of the assured for damage caused in such collision shall not be covered by the Collision Clause in this policy.

If war risks are hereafter insured by endorsement on this policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

Under either of these clarifications of the F. C. & S. clause there would not be the slightest question that the present case would be entirely excluded as a war risk.

We respectfully submit that the court should give full consideration to the action of the industry in this instance. The changes made in the F. C. & S. clause clearly reflect the considered thought of the marine insurance industry that it was never intended that a collision such as the present one should be considered a war risk loss.

CONCLUSION

We, therefore, respectfully submit that the trial court was in error in each of the particulars assigned by appellant as error and that the decree of the lower court should be reversed.

Respectfully submitted,

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